KFH IJARAH HOUSE (M) SDN BHD A

v.

KERAJAAN MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR B
LAU BEE LAN J
[SUIT NO: S-21-186-2003]
3 NOVEMBER 2010

ADMINISTRATIVE LAW: *Public servants - Authority - Authority of government servant to enter into contracts binding government - Assistant Curator of Muzium awarding contract without knowledge or approval of Jabatan Muzium - Whether contract binding upon Jabatan Muzium - Whether officer had express or ostensible authority to award contract - Whether exception to Turquand's case applied - Whether Jabatan Muzium had by conduct represented officer as having requisite authority - Whether Jabatan Muzium estopped from denying authority of officer* C D

AGENCY: *Agent - Public servants - Authority of government servant to enter into contracts binding government - Assistant Curator of Muzium awarding contract without knowledge or approval of Jabatan Muzium - Whether contract binding upon Jabatan Muzium - Whether officer had express or ostensible authority to award contract - Whether exception to Turquand's case applied - Whether Jabatan Muzium had by conduct represented officer as having requisite authority - Whether Jabatan Muzium estopped from denying authority of officer* E F

Panji Alam Creative (M) Sdn Bhd ("Panji Alam") was awarded a contract by Jabatan Muzium Dan Antikuiti Malaysia ("Jabatan Muzium") to supply historical artifacts for Kompleks Kota Ngah Ibrahim or Kompleks Sejarah Matang and Muzium Perak ("Kompleks Kota Ngah Ibrahim") valued at RM1,212,650. Panji Alam applied to the plaintiff for an Al-Murabaha facility to finance the purchase of the historical artifacts and for this purpose, absolutely assigned the payment under the said contract to the plaintiff. By a letter dated 11 September 2000 Jabatan Muzium acknowledged and agreed to the assignment of the payment to the plaintiff and also of payment directly to the plaintiff. The plaintiff then purchased and paid for the historical artifacts which were delivered to Kompleks Kota Ngah Ibrahim. However, no payment was made to the plaintiff by the defendant and hence this claim by the plaintiff. The defendant claimed that it had no knowledge about the plaintiff and of the contract allegedly awarded to the G H I

plaintiff. It was argued that any purported award of contract was made by Encik Abdul Latib, the then Assistant Curator ("Latib") without any direction, knowledge, agreement and approval by the Jabatan Muzium and the Ministry of Finance Malaysia ("MOF") and that the former had acted in his own personal capacity in dealings with Panji Alam. According to the defendant, Latib had wrongfully used the defendant's letterhead without the consent, knowledge or permission of the defendant and he acted in his own capacity. Hence, the defendant contended that the contract was in contravention of the procedures in accordance to s. 2 of the Government Contracts Act 1949 ("the Act") and therefore the plaintiff was not entitled to any claim for payment. The issues arising for determination were: (i) whether Latib had express and/or ostensible authority to award the contract to supply historical artifacts to Kompleks Kota Ngah Ibrahim; (ii) whether the defendant was bound by the letter of 11 September 2000 to effect payment for the historical artifacts to the plaintiff; and (iii) whether the defendant was in any event liable to pay to the plaintiff for the historical artifacts.

Held (allowing the plaintiff's claim):

(1) The exception to the *Turquand*'s case did not apply in the factual matrix of this case. The fact that Latib was the Assistant Curator of Muzium Perak was confirmed. Latib and all other officers of the Muzium Department were a single composite known as the government; each of their act was an act of the government; the acts carried out by Latib was part of a chain of command and the decision made by the government through him was indicative of a devolution of power from a higher authority which was an integrated part of the system of government. (paras 11-11.4)

(2) Latib was provided with letterheads of Jabatan Muzium from the headquarters for him to issue letters for his daily duties as the highest ranking officer at Kompleks Kota Ngah Ibrahim. Latib dealt with members of the public as part of his daily duties. There was no limitation or restriction printed on the letterheads with regard to Latib's authority to issue or sign letters on behalf of Jabatan Muzium. (paras 11.3 & 11.4)

(3) Panji Alam and the plaintiff had honestly and reasonably believed in the existence of the authority to the extent apparent to Latib. In addition, the defendant as principal had

held out Latib as their agent to have the authority to deal with the public including Panji Alam and the plaintiff on matters relating to Kompleks Kota Ngah Ibrahim. (para 11.6)

(4) Even if Latib did not have the authority to sign the disputed letters, the defendant had by their conduct represented or permitted to be represented to the plaintiff that Latib had the authority to act on the defendant's behalf and consequently the defendant was bound by Latib's acts to the same extent as if he had the authority. The defendant was now estopped from denying the authority of Latib. Latib had apparent or ostensible authority, if not actual authority, to enter into the contract with Panji Alam and also to acknowledge the assignment to pay the plaintiff. (para 11.8)

(5) The defendant through Jabatan Muzium had entered into the contract and were now trying to escape liability to invalidate the same on the ground that s. 2 of the Act was not followed. The court should be slow to declare the contract void and unenforceable; and "would not be astute to lend its aid" to enable the defendant to avoid liability under s. 2 of the Act having regard to the fact that Kompleks Kota Ngah Ibrahim had used the items supplied for ten years. (paras 14.2-15)

(6) The assignment of the debt from Panji Alam to the plaintiff was an absolute assignment. The defendant had on a balance of probabilities received the notice of assignment. (para 16.2)

Case(s) referred to:

Badrul Ahmad & Ors v. Government of Malaysia & Ors [1986] 1 LNS 23 SC ***(refd)***

Balakrishnan v. Ketua Pengarah Perkhidmatan Awam Malaysia And The Government of Malaysia [1981] 1 LNS 64 FC ***(refd)***

Bank Bumiputra (M) Bhd & Anor v. Lorrain Esme Osman & Another Case [1987] 1 CLJ 572; [1987] CLJ (Rep) 472 HC ***(refd)***

Coramas Sdn Bhd v. Rakyat First Merchant Bankers Bhd & Anor [1994] 2 CLJ 143 SC ***(refd)***

Carltona Ltd v. Commissioners of Works And Others [1943] 2 All ER 560 ***(refd)***

Chew Hock San & Ors v. Connaught Housing Development Sdn Bhd & Another Case [1985] 1 CLJ 533; [1985] CLJ (Rep) 64 FC ***(refd)***

Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd & Anor [1964] 2 QB 480 ***(refd)***

Metropolitan Borough and Town Clerk of Lewisham v. Roberts [1949] 2 KB 608 ***(refd)***

A *MMC Power Sdn Bhd & Anor v. Abdul Fattah Mogawan & Anor [2001] 1 CLJ 207 CA* ***(refd)***
Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***
Suwiri Sdn Bhd v. Government Of The State Of Sabah [2008] 1 CLJ 123 FC ***(refd)***
B *The Co-operative Central Bank Limited (In Receivership) v. Feyen Development Sdn Bhd [1995] 4 CLJ 300 FC* ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***
UMW Industries (1985) Sdn Bhd v. Ah Fook [1996] 1 CLJ 379 FC ***(refd)***
Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd [1978] 139 CLR
C *410* ***(refd)***

Legislation referred to:
Banking and Financial Institutions Act 1989, ss. 45(1), 103(1)
Civil Law Act 1956, s. 4(3)
Companies Act 1965, s. 133(1)
D Government Contracts Act 1949, ss. 2, 6, 7, 9

For the plaintiff - Paari Perumal; M/s Joseph Yeo
For the defendant - Azlina Mahmod SFC

Reported by Amutha Suppayah
E

JUDGMENT

F **Lau Bee Lan J:**

[1] Basically the plaintiff's pleaded case is that Panji Alam Creative (M) Sdn Bhd ("Panji Alam") was awarded a contract *vide* reference JMA/KSNP/PBB/146/2000/6 by Jabatan Muzium Dan Antikuiti Malaysia ("Jabatan Muzium") to supply historical artifacts
G for Kompleks Kota Ngah Ibrahim or Kompleks Sejarah Matang and Muzium Perak ("Kompleks Kota Ngah Ibrahim") valued at RM1,212,650 listed as Annexure "A" to the statement of claim. Panji Alam applied to the plaintiff for an Al-Murabaha facility to finance the purchase of the historical artifacts and in support of
H the said application and as a condition for its approval, by a letter dated 9 September 2000 addressed to Dato' Pengarah, Panji Alam absolutely assigned the payment under the said contract to the plaintiff. By a letter dated 11 September 2000 Jabatan Muzium acknowledged and agreed to the assignment of the payment to the
I plaintiff and also of payment directly to the plaintiff. The plaintiff relied on the letters and approved an Al-Murabaha facility of

RM1,098,483.10 to Panji Alam subject to the terms and conditions therein. The plaintiff purchased and paid for the historical artifacts which were delivered to Kompleks Kota Ngah Ibrahim. Since no payment was made to the plaintiff by the defendant for the same, the plaintiff claims for the sum of RM1,098,483.10 from the defendant.

[2] Essentially, the defendant's case is that they have no knowledge about the plaintiff and of the contract allegedly awarded to the plaintiff. Any purported award of contract was made by Encik Abdul Latib bin Ariffin, the then Assistant Curator ("Abdul Latib") without any direction, knowledge, agreement and approval by the Jabatan Muzium and the Ministry of Finance Malaysia ("MOF") and the former has acted in his own personal capacity in dealings with Panji Alam. The purported contract is not binding on the defendant as Abdul Latib has not acted as the defendant's agent; it is irregular and contrary to the guidelines applicable to any contract entered on defendant's behalf. Abdul Latib has wrongfully used the letterhead of the defendant's Department without the consent, knowledge or permission of the defendant when the letter of 11 September 2000 was issued to the plaintiff and he acted in his own capacity; he was a mere employee of the defendant and did not act within the powers of his service when he appointed Panji Alam as the supplier of the historical artifacts for Kompleks Kota Ngah Ibrahim. The defendant is not liable to make any payment for the historical artifacts as it has not entered any contract with Panji Alam and/or the plaintiff; it is only the defendant's headquarters in Kuala Lumpur which is responsible and authorised to deal with any placement of order for any historical artifacts; the defendant has never appointed or authorised Abdul Latib or any other party to make any decision on behalf of the defendant's headquarters. The plaintiff is not entitled to any claim for payment, which payment, if any, should be claimed from Abdul Latib as all the dealings related to supply of the historical artifacts were made between the plaintiff and Abdul Latib without the approval and knowledge of the defendant.

[3] The issues to be determined are marked as "E":

1. Whether the Assistant Curator, Ab. Latib bin Ariffin has express and/or ostensible authority to award the contract to supply historical artifacts to Kompleks Kota Ngah Ibrahim ("1st Issue");

A

2. Whether the defendant is bound by the letter of 11 September 2000 to effect payment for the historical artifacts to the plaintiff ("2nd Issue"); and

3. Whether the defendant was in any event liable to pay to the plaintiff for the historical artifacts ("3rd Issue").

B

[4] The plaintiff called five witnesses, Encik Mohd. Bokhari bin Abdullah (PW1), Managing Director of the Panji Alam, Encik Zakbah bin Harun (PW2), Executive, Business Development Department of the plaintiff, Puan Aini Harinawati bte Abu Hashim
C (PW3), Manager of the Financial and Administration Department of the plaintiff, Encik Zainal bin Jani (PW4), Executive, Marketing Department of the plaintiff and Encik Zubir bin Abdul Malek (PW5), Collection and Follow-up Manager of the plaintiff. In the case of PW2, PW3, PW4 and PW5 these were the positions held
D at the material time.

4.1 The defendants called two witnesses, Encik Kamarul Baharin bin A Kasim (DW1), the Penolong Pengarah Unit Etnologi, Bahagian Penyelidikan Jabatan Muzium Malaysia
E and Timbalan Pengarah Muzium Etnologi Dunia Melayu (in August 2000) and Dato' Dr. Kamarul Baharin bin Buyong (DW2), Ketua Pengarah Jabatan Muzium dan Antikuiti at the material time.

F 4.2 PW1 was a subpoenaed witness whilst the witness statements of PW2, PW3, PW4, PW5, DW1 and DW2 are marked as WSPW2, WSPW3, WSPW4, WSPW5, WSDW1 and WSDW2, respectively and constitute their evidence given in chief.

G **[5]** The court has considered the plaintiff's submission dated 7 June 2010, the defendant's submission of 10 June 2010 and the parties' oral reply on 14 June 2010. On a balance of probabilities I had found that the plaintiff has proven its claim and allowed the plaintiff's claim in terms of para. 11(1) of the statement of claim
H for RM1,098,483.10 and interest at 8% from date of the writ of summons and statement of claim (5 June 2003) to date of full payment with costs fixed at RM20,000. The defendant has appealed. The reasons are stated below.

I

1st Issue

[6] Learned Senior Federal Counsel, Cik Azlina Mahmod, submits firstly, there is no contract created between Abdul Latib and Panji Alam because:

(i) Abdul Latib had awarded a contract without the instruction, knowledge, agreement and consent of Jabatan Muzium and the Ministry of Finance Malaysia ("MOF") which was required in the purchase of the historical artifacts;

(ii) the contract was in contravention of the procedures in accordance to s. 2 of the Government Contracts Act 1949 ("the Government Contracts Act") applicable to any contract made by the defendant ie, the contract was not signed by a Minister or by the public officer duly authorized in writing by the Minister but was signed by Abdul Latib himself without authorization. In addition ss. 6 and 9 of the Government Contracts Act and the case of *Suwiri Sdn Bhd v. Government of the State of Sabah* [2008] 1 CLJ 123 (FC) was cited in support of the proposition;

(iii) the defendant was under no obligation to be bound by the terms of the contract as Abdul Latib has no legal capacity to act on behalf of the defendant as he has no written authorization from the Minister. Section 7 of the Government Contracts Act was cited.

[7] Secondly, the learned SFC submits there is doubt on the payment of RM1,212,650 by Jabatan Penilaian (Jabatan Muzium) because there is no mention in the said letter exh. P3 (bundle C at p. 25 (C/25)) regarding the said payment in para. 5 of which reads:

> 5. Pihak Kompleks Sejarah Matang akan memajukan perkara ini ke pihak Jawatankuasa Penilai (Jabatan Muzium Dan Antikuiti Malaysia) untuk tindakan pembayaran.

[8] Thirdly, the learned SFC submits:

(i) there are contradictions with respect to the reference numbers in exh. P3 (JMA/KSNP/PBB/146/2000/6) where the last digit is "6" and exh. P3A (JMA/KSNP/PBB/146/2000/4) where the last digit is "4";

(ii) there is doubt whether exh. 3 is part of exh. 3A and doubt as to who is the author of the list of items in exh. P3A as there is no mention of the same in exh. P3;

(iii) there is doubt whether exh. 3A referred to the list of items and prices agreed by Kompleks Kota Ngah Ibrahim and to be paid by the defendant;

(iv) if exh. 3A referred to the list of items payable by the defendant, there should be more than one person to acknowledge the transaction between Panji Alam and the defendant as the amount involved is large.

[9] I find there is no merit with respect to the 2nd and 3rd contentions of the defendant (paras 7 and 8 above). Exhibit P1 (C/18) dated 9 July 2000 issued by Abdul Latib of Kompleks Kota Ngah Ibrahim at para. 3 categorically states "Dengan ini pihak muzium melantik syarikat tuan untuk membekalkan bahan-bahan bersejarah yang ada hubungkait dengan Kota Ngah Ibrahim". Paragraph 7 states the urgency of the supply. Exhibit P2 (C/20-24) are the guidelines for the items to be supplied by Panji Alam provided by Kompleks Kota Ngah Ibrahim through Abdul Latib. Exhibit P3 (C/25) dated 12 August 2000 issued by Abdul Latib of Kompleks Kota Ngah Ibrahim states at para. 3 "Pihak Muzium Sejarah Matang telah pun menerima bahan-bahan sejarah ini mengikut senarai jenis, serta pihak kami telah membuat penelitian serta penilaian sejarah dan pihak Muzium berpuas hati dengan keseluruhan bahan ini, serta menerimanya dalam keadaan baik dan memuaskan." and at para. 5 states "Pihak Kompleks Sejarah Matang akan memajukan perkara ini ke pihak Jawatankuasa Penilai (Jabatan Muzium Dan Antikuiti Malaysia) untuk tindakan pembayaran." Exhibit P3A (C/26-31) enumerates the goods supplied to Kompleks Kota Ngah Ibrahim under the letter exh. P3 by virtue of the following matters:

(a) the statement in para. 3 as emphasised above corresponds with the usage of the words "jenis barang" in exh. P3A; and

(b) the statement "Jumlah harga barang-barang yang telah dipersetujui kepada pihak Kompleks Sejarah Matang Sebanyak RM1,212,650 ..." at p. 31 in exh. P3A which shows the receipt of the goods by Abdul Latib.

9.1 Learned Counsel for the Plaintiff, Mr. Paari Perumal submits that the Jawatankuasa Pembelian Harta Kebudayaan and the Urusetia Jawatankuasa Pembelian Harta Kebudayaan as testified by SD1 and SD2 and the meetings held by them are the Defendant's internal management affairs and are not known to the Plaintiff and Panji Alam. (I shall elaborate on this point further when dealing with the question of the authority of Abdul Latib hereafter). The contract between the Defendant and Panji Alam is made up of documents marked as exhs. P1, P2, P3 and P3A was already concluded before any of this meeting discussed the contract and payment to be made thereunder.

9.2 I find there is merit in the submission made on the plaintiff's behalf. There is the evidence from SP1 that Panji Alam received exh. P1 together with exh. P2; Panji Alam supplied the historical artifacts as requested as per the list in exh. P3A which was duly acknowledged received by Latib *vide* exh. P3 and the amount was RM1,212,650. SP1 testified that the reference no. for the supply of the historical artifacts is JMA/KSNP/PBB/146/2000/6.

9.3 Further support that such a contract bearing such a reference no. existed is exh. D32 (D/11), a certified true copy of a document titled "Tuntutan Pembayaran Harta Kebudayaan No. Rujukan: JMA/KSNP/PBB/146/2000/6" issued by SP1 to the "Dato Ketua Pengarah Jabatan Muzium dan Antikuiti Malaysia" giving the particulars of Panji Alam's account no. and the name of the bank for purposes of receiving payment. The said document was certified by Encik Zawawi bin Haji Osman, the Pendaftar of Jabatan Muzium and Antikuiti who according to SD2 acted as the secretariat to the "Jawatankuasa Perolehan Harta Kebudayaan" and was authorised to deal with aspects of procurement, including certify documents and the said document acknowledged the claim of Panji Alam for payment under contract reference no. JMA/KSNP/PBB/146/2000/6.

9.4 I find there is no contradiction in the contract reference no. JMA/KSNP/PBB/146/2000/6 because as correctly submitted by the learned counsel for the plaintiff at the outset of the trial the amended figure "4" appearing in the

reference no. JMA/KSNP/PBB/146/2000/6 in the statement of issues of facts that are disputed ("F") was re-amended to "6". When it was re-amended to "6", Appendix A at p. 10 of statement of claim ("A") refers to the same "senarai" where the figure "4" appears. SD1 confirmed in cross-examination that Jabatan Muzium only received one "senarai" ie, at C/26-31 from Panji Alam. Therefore I agreed with the plaintiff when it was re-emended to "6" it also includes the "senarai" at C/26-31 (exh. P3A).

[10] Before dealing with the 1st contention of the defendant (para. 6 above), I shall state the defendant's position on the authority of Abdul Latib as the two points are linked. Basically the learned SFC contends:

(i) Abdul Latib was a mere employee of the defendant and has not acted within the scope of his employment in appointing Panji Alam as the supplier of the historical artifacts. SD2 stated Abdul Latib has no express and/or implied authority to award the contract as it was the defendant's head office in KL who is responsible and has the power to purchase the artifacts;

(ii) as there is a huge amount of money involved, SP1 as a reasonable contractor should call the headquarters to confirm whether Abdul Latib has the authority to enter into the contract bearing in mind that exh. P3 was not received by SD2. For this proposition the learned SFC relied on the exception to *Turquand*'s case in *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors.* [1998] 1 CLJ 793 (FC) referred to by His Lordship Edgar Joseph Jr. FCJ at p. 507 and submitted that outsiders dealing with the defendant who might reasonably know some relevant procedure internal to the Department of Museum has not been followed must make inquiry as to the authority of Abdul Latib.

[11] I find there is no merit with regard to the 1st contention and the submission of the defendant on the authority of Abdul Latib (para. 10 above). In my view the exception to the *Turquand*'s case as submitted by the learned SFC does not apply in the factual matrix of this case. Learned counsel for the plaintiff drew to the court's attention the case of *Carltona Ltd v. Commissioners of Works and Others* [1943] 2 All ER 560 wherein at p. 563 A-B the English Court of Appeal said public business

could not be carried out unless the duties imposed upon ministers and the powers given to the ministers are normally exercised under the authority of the Ministers by responsible officials of the department.

11.1 In *Metropolitan Borough and Town Clerk of Lewisham v. Roberts* [1949] 2 KB 608 where one of the main arguments argued on behalf of the defendant the town clerk was not authorised to requisition the house because his only authority was derived from a letter from an official who was the general inspector of the Ministry of Health (one Mr. J. O'Gara) who had no authority to act on behalf of the Minister. Lord Denning at p. 621 followed the principle in *Carltona (supra)* and, *inter alia*, held the town clerk was an agent of the department and a sub-agent of the Crown. The case of *Carltona (supra)* was followed in *Balakrishnan v. Ketua Pengarah Perkhidmatan Awam Malaysia And The Government of Malaysia* [1981] 1 LNS 64; [1981] 2 MLJ 259 (FC) at p. 264 G-I and *Badrul bin Ahmad & Ors. v. Government of Malaysia & Ors.* [1986] 1 LNS 23; [1987] 2 MLJ 178 at p. 182 A-H; whilst the case of *Metropolitan Borough (supra)* was followed in *Badrul bin Ahmad (supra)*.

11.2 The fact that Latib is the Assistant Curator of Muzium Perak is confirmed by SD1 in cross-examination and SD2 in examination in chief and cross-examination. Based on the authorities above, as correctly submitted by the learned counsel for the plaintiff, Latib, SD2 as the then Ketua Pengarah and all other officers of the Muzium Department are a single composite known as the government; each of their act is an act of the government; the acts carried out by Abdul Latib is part of a chain of command and the decision made by the government through him is indicative of a devolution of power from a higher authority which is an integrated part of the system of government.

11.3 In addition SD2 testified in cross-examination that Abdul Latib was provided with letterheads of Jabatan Muzium from the headquarters for him to issue letters for his daily duties as the highest ranking officer at Kompleks Kota Ngah Ibrahim and that Abdul Latib dealt with members of the public as part of his daily duties. In addition SD1 and SD2 confirmed in cross-examination that there was no

limitation or restriction printed on the letterheads with regard to Abdul Latib's authority to issue or sign letters on behalf of Jabatan Muzium.

11.4 Further in cross-examination in relation to the letterheads, in my view it is important to observe the chronological sequence of questions posed to SD2 and his answers thereto. SD2 was reminded that in examination in chief (Q&A 12 in WSSD2) with reference to whether he had received exh. P6 (letter from Panji Alam dated 9 September 2000 on the assignment of the payment of the contract ref. no. JMA/KSNP/PBB/146/2000/6 to the plaintiff), he had said that if there were no chop acknowledging receipt by his office on a letter addressed to the Ketua Pengarah at Jabatan Muzium it meant that the letter was not received. SD1 was then asked whether he received exhs. P1, P3 and P7 which bore the footnote c.c. to the Dato Ketua Pengarah, he said he did not for the same reason.

11.5 However when SD2 was questioned why was it that the letters dated 9 January 2001 (exh. D37(D/15-16)) and 13 December 2000 (exh. 38 (D/24-25)) respectively, both of which were addressed to the Ketua Pengarah but bore no acknowledgment chop was said to be received by him, SD2 evaded the issue by replying "Jabatan yang menerimanya".

11.6 In the light of the answers given by SD2, I find it hard to believe that in all probability the letters, exhs. P1, 3, 6 and 7 were not received by the Ketua Pengarah or his department.

11.7 SP1 testified that when Panji Alam received exhs. P1, P3 and P7 from Jabatan Muzium signed by Abdul Latib, there were no reasons to suspect or doubt his authority to sign and issue the same. In this connection I am in agreement with the learned counsel for the plaintiff based on the factual circumstances in this case, Panji Alam and the plaintiff had honestly and reasonably believed in the existence of the authority to the extent apparent to Abdul Latib. In addition I also agreed with the plaintiff's

submission that the defendant as principal had held out Abdul Latib as their agent to have the authority to deal with the public including Panji Alam and the plaintiff on matters relating to Kompleks Kota Ngah Ibrahim.

11.8 Even if I were to err and if Abdul Latib did not have the authority to sign the disputed letters, I find the defendant had by their conduct represented or permitted to be represented to the plaintiff that Abdul Latib had the authority to act on the defendant's behalf and consequently the defendant is bound by Abdul Latib's acts to the same extent as if he had the authority. The defendant is now estopped from denying the authority of Abdul Latib. For this proposition I rely on the case of *MMC Power Sdn Bhd & Anor v. Abdul Fattah Mogawan & Anor* [2001] 1 CLJ 207 at p. 211 b-f where the Court of Appeal referred to a passage by Lord Diplock in *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd & Anor* [1964] 2 QB 480 at p. 503:

> An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppels, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

11.8.1 In fact the aforesaid passage on ostensible authority was also quoted in the case of *Chew Hock San & Ors v. Connaught Housing Development Sdn Bhd & Another Case* [1985] 1 CLJ 533; [1985] CLJ (Rep) 64 (FC) cited by the defendant.

A 11.9 During cross-examination the plaintiff has adduced evidence through SD2 that Abdul Latib had committed serious misconduct when he signed exhs. P1, P2, P3, P3A and P7 without authority, but strangely enough SD2 as Head of Department and "Pegawai Pengawal" who is
B mandated to take disciplinary action and report the serious misconduct to higher authorities as per the Arahan Perbendaharaan (exh. P39) admitted that no police report was lodged, neither were disciplinary proceedings taken against Abdul Latib but instead the latter has now retired
C on full pension. Testing the oral evidence of SD2 with the acts and deeds which are contemporaneous with the event, the reasonable inference to be drawn is that there was no such misconduct on the part of Abdul Latib as the defendant alleged (See *Tindok Besar Estate Sdn. Bhd. v. Tinjar Co.* [1979] 1 LNS 119; [1979] 2 MLJ 229 at
D p. 234 B-C). In my opinion Abdul Latib has apparent or ostensible authority, to enter into the contract with Panji Alam and also to acknowledge the assignment to pay the plaintiff.

E

[12] I shall now turn to the case of *Suwiri (supra)*. In this case, the appellant was granted a licence to fell and extract timber in a forest reserve in Keningau, Sabah comprising an area of 5,665.59 hectares. The said licence was valid for a period of five years
F (13 March 1993-13 March 1998). As the appellant was unable to extract the timber in the said area within the period stated in the licence an application for extension of time was made to the Setiausaha Hasil Bumi. The Setiausaha Hasil Bumi, in his letter dated 25 November 1997 to the Director of Forestry stated he
G agreed to have the licence renewed for the whole of the concession area for a period until 31 December 1999 but subject to a survey carried out by the Director of Forestry and also to the provision of the Sabah Forestry Enactment 1968. Contrary to what had been indicated by the Setiausaha Hasil Bumi, the
H respondent, instead of renewing the extension, decided to issue a new licence to the appellant reducing the concession area to 2,204.41 hectares with the remaining area of 3,461.18 hectares being distributed to three other companies under separate licences. Being dissatisfied with the decision of the respondent, the
I appellant initiated proceedings in the High Court, Kota Kinabalu claiming damages for breach of contract and other declaratory

reliefs. The High Court allowed the plaintiff's claim with costs but on appeal by the respondent, the Court of Appeal by a majority decision reversed the High Court decision and ordered the appellant's claim be dismissed with costs.

12.1 The Federal Court granted leave to the appellant to appeal to the Federal Court based on three questions and had dismissed the appeal. The 1st question is "Whether the Setiausaha Hasil Bumi for and on behalf of the Sabah State Government has the authority to approve the granting of any rights in or over a forest reserve or state land in Sabah". In respect of this question the Federal Court held:

(1) Section 3 of the Government Contracts Act 1949 will apply where the state government is made a party to the contract. The granting of timber licence in Sabah falls under s. 15 of the Sabah Forest Enactment 1968 (the 'Enactment') and is in accordance with s. 3 of the Government Contracts Act 1949.

(2) For a public officer (Setiausaha Hasil Bumi) to legally be allowed to enter into such a contract, s.3 of the Government Contracts Act 1949 must be satisfied. Section 3 clearly states that the public officer must show that he has the written authorization of the Chief or State Minister before he could act on behalf of the respondent.

(3) Without the necessary written authorization of the Minister, such actions would be void and invalid. There was no evidence adduced by the appellant before this court or at the courts below to show that the Setiausaha Hasil Bumi had been granted with such written authorization to act on behalf of the Sabah State Government. Therefore, it simply means that the Setiausaha Hasil Bumi had not been delegated with the authority to act for the respondent.

[13] Learned counsel for the plaintiff argued that the case of *Suwiri (supra)* was decided *per incuriam* as the Federal Court did not have the benefit of the Supreme Court decision of *Coramas Sdn Bhd v. Rakyat First Merchant Bankers Bhd & Anor* [1994] 2 CLJ 143 and *The Co-operative Central Bank Limited (in receivership) v. Feyen Development Sdn Bhd* [1995] 3 MLJ 313.

A 3.1 In *Coramas (supra)* the Australian case of *Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd* [1978] 139 CLR 410 was referred whilst the case of *Feyen (supra)* followed *Coramas (supra)* and *Yango Pastoral (supra)*. The principle in *Yango Pastoral (supra)* is:

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> It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy it needs qualification, because it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable. However, cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable, and in most cases it is sufficient to say, as has been said in many cases of authority, that the test is whether the contract is prohibited by the statute. Where a statute imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to *render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed* (emphasis added).

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13.2 In *Coramas (supra)*, the 1st respondent, on behalf of a consortium of lenders which it managed, agreed to sell and the appellant agreed to buy shares in Kesang Corp Bhd. At that time, the shares were registered in the name of the 2nd respondent. Part of the shares were delivered and payment was made by cheque to the 1st respondent. The 1st respondent, however, never presented the cheques for payment because it considered that prior consent of the Minister of Finance had to be obtained under s. 45(1) of the Banking and Financial Institutions Act 1989 ("the Act"). The appellant and the 1st respondent applied to Bank Negara for written approval but were rejected. The 1st respondent then repudiated the agreement and the appellant in turn issued a writ for damages against the respondents, alleging that the written consent of the Minister of Finance was not required for the agreement. At the trial, the following preliminary points of law were argued: (i) whether the agreement was subject to both the appellant and the respondents successfully obtaining the

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prior written approval of Bank Negara and the Minister of Finance pursuant to s. 45 of the Act; (ii) whether the appellant's failure to obtain the prior written approval of Bank Negara and/or the Minister of Finance rendered the agreement void or unenforceable; and (iii) whether the agreement was, in any event, rendered void and unenforceable by Bank Negara's refusal to grant its approval. On appeal by the appellant to the Supreme Court from the decision of the trial judge who answered the preliminary questions in the affirmative, the appeal was dismissed.

13.3 In *Coramas (supra)*, at p. 149, the Supreme Court stated s. 45(1) of the Act expressly prohibits any person from entering into any agreement or arrangement to acquire or dispose of any interest in the shares of a licensed institution of the kind defined therein within obtaining the prior written approval of the Minister of Finance. In this instant case s. 2 of the Government Contracts Act does not have a prohibition. Section 2 reads:

> 2. All contracts made in Malaysia on behalf of the Government shall, if reduced to writing, be made in the name of the Government of Malaysia and may be signed by a Minister or by any public officer duly authorized in writing by a Minister, either specially in any particular case, or generally for all contracts below a certain value in his department or otherwise as may be specified in the authorization.

13.4 In *Coramas (supra)*, at p. 149 the Supreme Court further stated the Act provide by s. 103(1) read with the Fourth Schedule, item 59, that any person who contravenes the provision of s. 45(1) commits an offence and shall on conviction be liable to imprisonment not exceeding five years or a fine not exceeding RM5 million or with both such imprisonment and fine. The Supreme Court considered next the question whether the Act does more than impose a penalty, or in other words, does non-compliance with its provisions render the agreement or arrangement void. At p. 149 the Supreme Court opined:

> In accordance with the judgment of Lord Esher MR in *Melliss v. Shirley Local Board*, we have to look at the statute as a whole and consider whether it imposes a

A penalty merely to deter persons from entering into such a contract, or for the purposes of revenue, or whether it is intended that a contract so entered into shall be valid in law.

B It follows that the mere fact that an agreement or arrangement is in contravention of s. 45(1) of the Act is not by itself alone enough to render the same void; to be so, there must be some other provision in the Act which has that effect.

C 13.5 At p. 150 the Supreme Court then held:

We were therefore driven to the inevitable conclusion that the alleged agreement of 14 December 1989 had contravened s. 45(1) of the Act, and being an act or undertaking which was forbidden by law in that it D violated a prohibitory enactment of the legislature, it was, by reason of s. 24 of the Contracts Act 1950, void.

13.6 Unlike in *Coramas (supra)*, s. 2 of the Government Contracts Act does not have a prohibition as described in E paras. 13.4 (penalty provision for non-compliance with prohibition) and 13.5 (provision stating contravention of the prohibitory provision renders the contract void) above.

[14] In *Feyen (supra)*, the appellant (the charge society) granted F a loan of RM3m to one Lim Kon Kwee (the borrower), a director of Feyen Development Sdn Bhd (the chargor company). The affidavit evidence showed that the loan was ultimately received by the chargor company. As security for the loan, two charges were created over two pieces of land belonging to the chargor company G in favour of the charge society. The chargor company defaulted and the charge society commenced two charge actions seeking, *inter alia*, orders of sale of the lands. The chargor company commenced separate proceedings seeking for declarations that the charges were illegal, void and unenforceable by reason of breach H of s. 133(1) of the Companies Act which prohibits a company, *inter alia*, from providing any guarantee or security for a loan given to its directors by a 3rd party. The sole question agreed before the trial judge was whether a breach of s. 133(1) of the act had any civil consequences with regard to the validity of the charges, I i.e whether the charges given in breach of s. 133(1) were valid and enforceable against the chargor company. The trial judge decided in favour of the chargor company and the charge society appealed (see Headnotes).

14.1 The Federal Court at p. 320H observed from the affidavit evidence of Kwan Teck Yang was fully aware of the object of the loan, "it is he who, as director of the chargor company, had created the charges on behalf of the charge company, and it is he who is now attempting to invalidate them on the ground that s. 133(1) had been breached." A B

14.2 Transposing to the factual matrix of the present case I am persuaded by the argument of the learned counsel for the plaintiff that the defendant through Jabatan Muzium has entered into the contract and are now trying to escape liability to invalidate the same on the ground that s. 2 of the Government Contracts Act was not followed. C

14.3 At p. 321C the Federal Court observed:

> It is obvious that s. 133 of the Act does not in terms say that a guarantee entered into or any security given in contravention thereof is to be void, although this would result in the imposition of criminal liability on the official of the company concerned, and on the company itself, by virtue of the general penalty provisions contained in ss. 369(1)(a) and 369(2) of the Act. D E

14.4 After referring to Coramas (supra) and approving *Yango (supra)*, the Federal Court at p. 321 I said:

> We note that Greig and Davis on the Law of Contract, at pp 1117ff, say that they see a trend in decisions whereby courts are now less ready to find a contract illegal or unenforceable simply by reason of a statutory provision. F

At p. 329 G-H and p. 330A, the Federal Court then said: G

> We would go further and say that to admit the defence of illegality to defeat the chargee society's application to enforce the charges by way of an order for sale, would, in the words of Mason J (as he then was) in Yango Pastoral (at p. 428), provide 'a windfall gain' to the chargor company and others in a similar position. H

14.5 Applying the principle to this instant case, I am incline to agree with the submission of the learned counsel for the plaintiff that the court should be slow to declare the contract void and unenforceable; and "would not be astute I

to lend its aid" to enable the defendant to avoid liability under s. 2 of the Government Contracts Act having regard to the fact that Kompleks Kota Ngah Ibrahim have used the items supplied for ten years (exh. P1 is dated 9 July 2000).

2nd Issue

[15] SP1 in his evidence in chief testified that an Al-Murabaha facility was taken by Panji Alam from the plaintiff for the purpose of payment to the supplier of historical artifacts, Galeri Warisan M.A.R. Kuala Terengganu. The documentation in respect of the said facility are the loan application (C/4-61), Promise of Purchase Agreement (exh. P4 (C/102-105)) and Murabaha Sale Agreement (exh. P5 (C/112-126)) for the loan sum of RM1,098,483.10. In order to secure the loan from the plaintiff, SP1 said that Panji Alam assigned the debt of RM1,212,650 from the defendant to the plaintiff bearing contract no. JMA/KSNP/PBB/146/2000/6 *vide* exh. P6. The said letter clearly identifies the contract no. and that the contract sum of RM1,212,650 is to be paid to the plaintiff absolutely. The defendant through Abdul Latib issued exh. P7 agreeing to make the payment direct to the plaintiff as per para. 4 of the said letter.

15.1 Learned counsel for the plaintiff contends that exhs. P6 and P7 evidences an absolute assignment in conformity with s. 4(3) of the Civil Law Act 1956.

15.2 Learned SFC whilst conceding that exh. P6 may constitute a notice of assignment however submits that the notice has not been delivered to the Dato' Director General of Jabatan Muzium as there was no chop of receipt by his office and the assignment was not valid. Section 4(3) of the Civil Law Act and *UMW Industries (1985) Sdn Bhd v. Ah Fook* [1996] 1 CLJ 379 and *Bank Bumiputra (M) Bhd & Anor v. Lorrain Esme Osman & Another Case* [1987] 1 CLJ 572; [1987] CLJ (Rep) 472 were cited.

[16] Section 4(3) of the Civil Law Act states:

> (3) Any **absolute** assignment, **by writing**, under the hand of the assignor, not purporting to be by way of charge only, **of any debt** or other legal chose in action, **of which express notice** in **writing has been given to the debtor**, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in

> action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor. (emphasis added).

16.1 The Federal Court in *UMW Industries Sdn Bhd (supra)* held:

> (2) Pursuant to s. 4(3) of the Civil Law Act 1956 ('the Act'), the conditions for effecting absolute legal assignments are: (i) that the assignment must be in writing under the hand of the assignor; (ii) that the assignment must be absolute and not by way of charge only; and (iii) that express notice in writing must have been given to the person liable to the assignor. If all the conditions are fulfilled, the assignment would transfer absolutely the chose in action and the right to sue upon it in the assignee's own name.

16.2 It is my finding that the assignment of the debt from Panji Alam to the plaintiff is an absolute assignment. The defendant has on a balance of probabilities received the notice of assignment (exh. P6) and in this regard I adopt what I have expressed at paras. 11.4 and 11.5 above.

[17] The learned SFC also submitted there is a contradiction of documents:

(a) that Panji Alam by letter dated 22 December 2000 (exh. D30 (D/27)) letter dated 12 February 2001 (exh. D29 (D/18)) and letter bearing reference no. JMA/KSNP/PBB/146/2000/6 (exh. D32(D/11)) to Dato Director-General requested payment be made to their Maybank account assigned to the plaintiff, why is there a need for Mohd. Bokhari to request another payment from Dato Director-General?

(b) that there is contradiction between exhs. P6 and P7 and exhs. D37 and 38 regarding to whom payment should be made because by exh. P6 Panji Alam requested that the Dato Director-General make payment to KFH Ijarah (Bank Islam, A/C 140 140 100 81382) and this was

A agreed to in exh. P7; conversely by letter dated 22 December 2000 (exh. D30 (D/27)) and letter dated 12 February 2001 (exh. D29 (D/18)) (not exh. D37 dated 22 October 2000 and exh. D38 dated 12 February 2001 as stated in the defendant's submission at pp. 9 and 10).

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17.1 I find based on the evidence adduced the SFC's contention is misconceived. SD1 under cross-examination agreed that Jabatan Muzium only received one list from Panji Alam which is found at Bundle C/26-31. It is C pertinent to observe the following responses of SD1 during cross-examination. Based on his answer in examination in chief (Q&A 5(iii) WSSD1) SD1 said:

> Bagi perolehan koleksi dari Panji Alam saya telah menerima sejumlah tawaran koleksi yang ditandatangani D oleh En Ab Latib Ariffin melalui Ketua Pengarah pada November 2000 bagi tujuan untuk dibawa ke dalam mesyuarat pembelian bagi menentukan status tawaran tersebut …

E Learned plaintiff's counsel then asked SD1:

> Jadi pada November 2000, kamu sudahpun tahu siapa punca, kenapa terperanjat dan kena buat siasatan?

SD1 replied:

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> Ok. Perkara ini amat memeranjatkan kerana ia merujuk kepada laporan daripada Biro Pengaduan Awam yang diterima sekitar, tak pasti tarikhnya, tapi sekitar bulan 2 hingga bulan 8 tahun 2000.

Learned plaintiff's counsel then asked SD1:

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> … Dan jika dilihat di muka surat 31, dengan jelasnya dinyatakan di situ apa yang perlu dibayar, yang telah dipersetujui kepada Panji Alam. Tertera RM1,212,650.00. So November 2000 sudah tahu kena bayar pada Panji Alam RM1,212,650.00. Jadi kenapa kena terperanjat bila ada complain yang jumlah itu belum dibayar. You H tahu November 2000 ada hutang pada Panji Alam.

SD1 replied:

> Ia tidak mengikut prosedur kewangan.

I Learned plaintiff's counsel then asked SD1:

> Tetapi tidak ikut prosedur kewangan kamu membawa masuk senarai ini ke dalam minit mesyuarat 5/2000 pada 28 November untuk dibentangkan untuk tujuan pengisian?

SD1 replied:

> Itu adalah bagi membolehkan prosedur dipatuhi sebelum pembayaran dilakukan.

Learned Plaintiff Counsel then asked SD1:

> ... saya rujuk Encik Kamarul kepada Ikatan Pliding kepada Pembelaan Terpinda Defendan. Setuju Pembelaan Defendan adalah bahawa contract yang dimasuki oleh Jabatan Muzium melalui Abdul Latib tidak sah?

SD1 replied – "Ya".

17.2 When cross-examined further whether he agreed that Bundle C/26-31(exh. P3A) is an integral part of bundle C/25 (exh. P3), SD1 replied "Kemungkinan". SD1 did not agree when it was put to him that altogether there were four contracts made between Jabatan Muzium and Panji Alam namely:

(i) JMA/KSNP/PBB/146/2000/6 for RM1,212,650;

(ii) Local Order no. Z209206 (exh. D20 (D/26)) for RM100,665 paid to Panji Alam;

(iii) Local Order no. Z209251(exh. D21(D/17) for RM35,500 paid to Panji Alam; and

(iv) Local Order no. Z209688 (exh. D23(D/10)) for RM140,882 paid to Panji Alam.

17.3 From a perusal of the local orders whereby payment were made to Panji Alam it is crystal clear that Local Order no. Z 209206 (exh. D20) and Local Order no. Z 209251 (exh. D21(D/17) are in respect of "Pembekalan (Harta Kebudayaan untuk Jabatan Muzium Jalan Damansara Kuala Lumpur" as per the invoices exh. D31 (D/28) and exh. D22 (D/19) and this was agreed to by SD1 in cross-examination. As for local Order no. Z 209688 (exh. D23) it can be seen that it corresponds to Invoice no. 00071 for "Pembelian Harta Kebudayaan 1/2001 (exh. D24 (D/12)) seperti yang dilampirkan" and the Lampiran is exh. D36 (D/13). In the light of such evidence I find there is no contradiction in the documents in the manner suggested by the learned SFC at all.

[18] Learned SFC also submits that "The defendant is entitled to assume that the assignment, if there is any, had been terminated and the defendant only need to pay to Panji Alam."

18.1 The defendant's contention is not acceptable because as correctly submitted by the learned counsel for the plaintiff this is not the plaintiff's pleaded case and it is trite law that a party is bound by its pleadings.

[19] For the reasons given on a balance of probabilities I found the plaintiff has proven its claim and allowed the claim as stated in para. 5 above.